

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

11 BARRETT PURDUM ET AL,

No. C 13-04816 DMR

12 Plaintiffs,

**ORDER RE MOTION FOR LEAVE TO
FILE A SECOND AMENDED
COMPLAINT [DOCKET NO. 60]**13 v.
14 DAVID WOLFE dba OLIVERS APPAREL,
LLC,

15 Defendant.

16 _____/
17 Before the court is Plaintiffs Barrett Purdum, Michael Armenta, and Michael Maher's motion
18 for leave to file a Second Amended Complaint. [Docket No. 60.] The court held a hearing on July
19 31, 2014. For the reasons stated below, Plaintiffs' motion to amend is granted in part and denied in
20 part.
21**I. Background****A. Allegations in First Amended Complaint¹**

22 This case involves a dispute regarding the ownership and control of Olivers Apparel, LLC
23 ("Olivers"), a San Francisco start-up specializing in the manufacture and retail of high-end men's
24 shorts. Plaintiffs are clothing designers who own and operate Taylor Stitch, LLC, an established
25 men's clothing company in San Francisco. (First Am. Compl. ("FAC") ¶ 9.) Plaintiffs allege that
26

27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47
48
49
50
51
52
53
54
55
56
57
58
59
60
61
62
63
64
65
66
67
68
69
70
71
72
73
74
75
76
77
78
79
80
81
82
83
84
85
86
87
88
89
90
91
92
93
94
95
96
97
98
99
100
101
102
103
104
105
106
107
108
109
110
111
112
113
114
115
116
117
118
119
120
121
122
123
124
125
126
127
128
129
130
131
132
133
134
135
136
137
138
139
140
141
142
143
144
145
146
147
148
149
150
151
152
153
154
155
156
157
158
159
160
161
162
163
164
165
166
167
168
169
170
171
172
173
174
175
176
177
178
179
180
181
182
183
184
185
186
187
188
189
190
191
192
193
194
195
196
197
198
199
200
201
202
203
204
205
206
207
208
209
210
211
212
213
214
215
216
217
218
219
220
221
222
223
224
225
226
227
228
229
230
231
232
233
234
235
236
237
238
239
240
241
242
243
244
245
246
247
248
249
250
251
252
253
254
255
256
257
258
259
260
261
262
263
264
265
266
267
268
269
270
271
272
273
274
275
276
277
278
279
280
281
282
283
284
285
286
287
288
289
290
291
292
293
294
295
296
297
298
299
300
301
302
303
304
305
306
307
308
309
310
311
312
313
314
315
316
317
318
319
320
321
322
323
324
325
326
327
328
329
330
331
332
333
334
335
336
337
338
339
340
341
342
343
344
345
346
347
348
349
350
351
352
353
354
355
356
357
358
359
360
361
362
363
364
365
366
367
368
369
370
371
372
373
374
375
376
377
378
379
380
381
382
383
384
385
386
387
388
389
390
391
392
393
394
395
396
397
398
399
400
401
402
403
404
405
406
407
408
409
410
411
412
413
414
415
416
417
418
419
420
421
422
423
424
425
426
427
428
429
430
431
432
433
434
435
436
437
438
439
440
441
442
443
444
445
446
447
448
449
450
451
452
453
454
455
456
457
458
459
460
461
462
463
464
465
466
467
468
469
470
471
472
473
474
475
476
477
478
479
480
481
482
483
484
485
486
487
488
489
490
491
492
493
494
495
496
497
498
499
500
501
502
503
504
505
506
507
508
509
510
511
512
513
514
515
516
517
518
519
520
521
522
523
524
525
526
527
528
529
530
531
532
533
534
535
536
537
538
539
540
541
542
543
544
545
546
547
548
549
550
551
552
553
554
555
556
557
558
559
5510
5511
5512
5513
5514
5515
5516
5517
5518
5519
5520
5521
5522
5523
5524
5525
5526
5527
5528
5529
5530
5531
5532
5533
5534
5535
5536
5537
5538
5539
55310
55311
55312
55313
55314
55315
55316
55317
55318
55319
55320
55321
55322
55323
55324
55325
55326
55327
55328
55329
55330
55331
55332
55333
55334
55335
55336
55337
55338
55339
55340
55341
55342
55343
55344
55345
55346
55347
55348
55349
55350
55351
55352
55353
55354
55355
55356
55357
55358
55359
55360
55361
55362
55363
55364
55365
55366
55367
55368
55369
55370
55371
55372
55373
55374
55375
55376
55377
55378
55379
55380
55381
55382
55383
55384
55385
55386
55387
55388
55389
55390
55391
55392
55393
55394
55395
55396
55397
55398
55399
553100
553101
553102
553103
553104
553105
553106
553107
553108
553109
553110
553111
553112
553113
553114
553115
553116
553117
553118
553119
553120
553121
553122
553123
553124
553125
553126
553127
553128
553129
553130
553131
553132
553133
553134
553135
553136
553137
553138
553139
553140
553141
553142
553143
553144
553145
553146
553147
553148
553149
553150
553151
553152
553153
553154
553155
553156
553157
553158
553159
553160
553161
553162
553163
553164
553165
553166
553167
553168
553169
553170
553171
553172
553173
553174
553175
553176
553177
553178
553179
553180
553181
553182
553183
553184
553185
553186
553187
553188
553189
553190
553191
553192
553193
553194
553195
553196
553197
553198
553199
553200
553201
553202
553203
553204
553205
553206
553207
553208
553209
553210
553211
553212
553213
553214
553215
553216
553217
553218
553219
553220
553221
553222
553223
553224
553225
553226
553227
553228
553229
553230
553231
553232
553233
553234
553235
553236
553237
553238
553239
553240
553241
553242
553243
553244
553245
553246
553247
553248
553249
553250
553251
553252
553253
553254
553255
553256
553257
553258
553259
553260
553261
553262
553263
553264
553265
553266
553267
553268
553269
553270
553271
553272
553273
553274
553275
553276
553277
553278
553279
553280
553281
553282
553283
553284
553285
553286
553287
553288
553289
553290
553291
553292
553293
553294
553295
553296
553297
553298
553299
553300
553301
553302
553303
553304
553305
553306
553307
553308
553309
553310
553311
553312
553313
553314
553315
553316
553317
553318
553319
553320
553321
553322
553323
553324
553325
553326
553327
553328
553329
553330
553331
553332
553333
553334
553335
553336
553337
553338
553339
5533310
5533311
5533312
5533313
5533314
5533315
5533316
5533317
5533318
5533319
55333110
55333111
55333112
55333113
55333114
55333115
55333116
55333117
55333118
55333119
553331110
553331111
553331112
553331113
553331114
553331115
553331116
553331117
553331118
553331119
5533311110
5533311111
5533311112
5533311113
5533311114
5533311115
5533311116
5533311117
5533311118
5533311119
55333111110
55333111111
55333111112
55333111113
55333111114
55333111115
55333111116
55333111117
55333111118
55333111119
553331111110
553331111111
553331111112
553331111113
553331111114
553331111115
553331111116
553331111117
553331111118
553331111119
5533311111110
5533311111111
5533311111112
5533311111113
5533311111114
5533311111115
5533311111116
5533311111117
5533311111118
5533311111119
55333111111110
55333111111111
55333111111112
55333111111113
55333111111114
55333111111115
55333111111116
55333111111117
55333111111118
55333111111119
553331111111110
553331111111111
553331111111112
553331111111113
553331111111114
553331111111115
553331111111116
553331111111117
553331111111118
553331111111119
5533311111111110
5533311111111111
5533311111111112
5533311111111113
5533311111111114
5533311111111115
5533311111111116
5533311111111117
5533311111111118
5533311111111119
55333111111111110
55333111111111111
55333111111111112
55333111111111113
55333111111111114
55333111111111115
55333111111111116
55333111111111117
55333111111111118
55333111111111119
553331111111111110
553331111111111111
553331111111111112
553331111111111113
553331111111111114
553331111111111115
553331111111111116
553331111111111117
553331111111111118
553331111111111119
5533311111111111110
5533311111111111111
5533311111111111112
5533311111111111113
5533311111111111114
5533311111111111115
5533311111111111116
5533311111111111117
5533311111111111118
5533311111111111119
55333111111111111110
55333111111111111111
55333111111111111112
55333111111111111113
55333111111111111114
55333111111111111115
55333111111111111116
55333111111111111117
55333111111111111118
55333111111111111119
553331111111111111110
553331111111111111111
553331111111111111112
553331111111111111113
553331111111111111114
553331111111111111115
553331111111111111116
553331111111111111117
553331111111111111118
553331111111111111119
5533311111111111111110
5533311111111111111111
5533311111111111111112
5533311111111111111113
5533311111111111111114
5533311111111111111115
5533311111111111111116
5533311111111111111117
5533311111111111111118
5533311111111111111119
55333111111111111111110
55333111111111111111111
55333111111111111111112
55333111111111111111113
55333111111111111111114
55333111111111111111115
55333111111111111111116
55333111111111111111117
55333111111111111111118
55333111111111111111119
553331111111111111111110
553331111111111111111111
553331111111111111111112
553331111111111111111113
553331111111111111111114
553331111111111111111115
553331111111111111111116
553331111111111111111117
553331111111111111111118
553331111111111111111119
5533311111111111111111110
5533311111111111111111111
5533311111111111111111112
5533311111111111111111113
5533311111111111111111114
5533311111111111111111115
5533311111111111111111116
5533311111111111111111117
5533311111111111111111118
5533311111111111111111119
55333111111111111111111110
55333111111111111111111111
55333111111111111111111112
55333111111111111111111113
55333111111111111111111114
55333111111111111111111115
55333111111111111111111116
55333111111111111111111117
55333111111111111111111118
55333111111111111111111119
553331111111111111111111110
553331111111111111111111111
553331111111111111111111112
553331111111111111111111113
553331111111111111111111114
553331111111111111111111115
553331111111111111111111116
553331111111111111111111117
553331111111111111111111118
553331111111111111111111119
5533311111111111111111111110
5533311111111111111111111111
5533311111111111111111111112
5533311111111111111111111113
5533311111111111111111111114
5533311111111111111111111115
5533311111111111111111111116
5533311111111111111111111117
5533311111111111111111111118
5533311111111111111111111119
55333111111111111111111111110
55333111111111111111111111111
55333111111111111111111111112
55333111111111111111111111113
55333111111111111111111111114
55333111111111111111111111115
55333111111111111111111111116
55333111111111111111111111117
55333111111111111111111111118
55333111111111111111111111119
553331111111111111111111111110
553331111111111111111111111111
553331111111111111111111111112
553331111111111111111111111113
553331111111111111111111111114
553331111111111111111111111115
553331111111111111111111111116
553331111111111111111111111117
553331111111111111111111111118
553331111111111111111111111119
5533311111111111111111111111110
5533311111111111111111111111111
5533311111111111111111111111112
5533311111111111111111111111113
5533311111111111111111111111114
5533311111111111111111111111115
5533311111111111111111111111116
5533311111111111111111111111117
5533311111111111111111111111118
55333111111111111111

1 they wanted to develop a new high-end line of athletic clothing and sought Defendant Wolfe's help
2 with operations-related tasks for the endeavor. (FAC ¶ 11.) After agreeing to move forward with
3 Defendant with plans for the venture, Plaintiffs developed a men's athletic short and created
4 pictures, images, and descriptions of the product. (FAC ¶¶ 13-16.) In order to raise funds for the
5 new venture, Plaintiffs and Defendant launched a campaign on Kickstarter, an online funding
6 platform, raising over \$270,000 in 31 days. (FAC ¶¶ 23-24.)

7 The parties agreed to form Olivers as a California limited liability company (LLC). On
8 August 13, 2013, in order to formalize the business structure, Plaintiffs and Defendant entered into
9 an agreement ("Agreement") which detailed the governance of the new LLC. (FAC ¶ 28.) The
10 Agreement states that Defendant owns forty percent of the company and that Plaintiffs each own
11 twenty percent. (FAC ¶ 29.) According to the Agreement, Defendant received fifty percent of the
12 voting rights and Plaintiffs collectively received fifty percent voting rights. (FAC ¶ 31.) The
13 parties' business relationship began to unravel in late August 2013. According to Plaintiffs, the
14 parties began negotiations regarding their respective future involvement with Olivers as it became
15 clear that Plaintiffs and Defendant would not be able to work together. (FAC ¶¶ 33, 34.) Plaintiffs
16 state that they made two offers to Defendant that would have allowed the parties to end their
17 partnership. In the first, Plaintiffs offered Defendant full control of the company in exchange for
18 sixty percent of the Kickstarter profits, and in the second, Plaintiffs offered Defendant five percent
19 of the company's profits going forward and forty percent of the Kickstarter profits in exchange for
20 Defendant walking away from Olivers. (FAC ¶¶ 36-37.) Plaintiffs allege that Defendant responded
21 to their offers by changing the passwords on the Kickstarter page and other websites, effectively
22 locking out Plaintiffs from Olivers. (FAC ¶¶ 38-39.) Defendant also transferred the Kickstarter
23 funds to a bank account that only he controlled. (FAC ¶ 40.) Plaintiffs allege that Defendant is now
24 in sole control of Olivers and has been communicating with Olivers' Kickstarter backers under
25 Plaintiffs' names. (FAC ¶¶ 39, 42.)

26 On October 16, 2013, Plaintiffs filed a complaint against Defendant alleging a single claim
27 for trademark infringement. (Compl. ¶ 1.) On November 13, 2013, Plaintiffs filed the FAC,
28 bringing seven causes of action against Defendant: (1) copyright infringement; (2) trademark

1 infringement; (3) tortious interference with prospective economic advantage; (4) unfair competition;
 2 (5) false or misleading statements; (6) breach of fiduciary duty; and (7) breach of contract.²

3 **B. Proposed Second Amended Complaint**

4 On March 26, 2014, the court issued orders setting May 23, 2014 as the last day to amend the
 5 pleadings and directing the parties to address in their amended pleadings those claims and remedies
 6 that would lead to a determination of the parties' ownership interests in Olivers. [Docket Nos. 55
 7 (March 26, 2014 Order), 56 (Minute Order).] Plaintiffs timely filed the present motion. The
 8 proposed Second Amended Complaint (SAC) adds claims against Defendant for (1) breach of
 9 partnership agreement; (2) unjust enrichment; (3) conversion; and (4) declaratory relief. (Proposed
 10 SAC.) In addition, Plaintiffs seek to add Defendant's counsel Enenstein & Ribakoff, APC ("E&R")
 11 as a defendant and to bring a claim of conversion against E&R. (Proposed SAC ¶ 124.)

12 Plaintiffs add new factual allegations in the proposed SAC relevant to the new claims against
 13 Defendant and E&R. Plaintiffs now allege that Defendant used "some material portion of the
 14 Kickstarter funds" for his own personal benefit, which harmed Olivers. (Proposed SAC ¶¶ 42, 53.)
 15 More specifically, Plaintiffs allege that Defendant used the funds to "pursue [his] own personal
 16 interest and agenda" by paying his legal fees related to this lawsuit. (Proposed SAC ¶ 46.) Based
 17 on information and belief, E&R accepted the funds and was fully aware that the funds paid to it by
 18 Defendant did not belong to him but instead belonged to Olivers. (Proposed SAC ¶¶ 47-48.)
 19 Plaintiffs further state that Defendant and E&R continue to benefit from property that belongs to
 20 them as the majority-owning members of Olivers. (Proposed SAC ¶ 54.) Moreover, Plaintiffs have
 21 not received any compensation for their share of the work in launching the company, even though
 22 they jointly founded it. (Proposed SAC ¶¶ 113-16.) Instead, Defendant not only refuses to
 23 distribute funds to Plaintiffs, but is using the funds for his own benefit. (Proposed SAC ¶¶ 121-22.)

24 **II. Legal Standard**

25 Under Federal Rule of Civil Procedure 15(a), leave to amend should be granted as a matter

27 ² On October 15, 2013, Olivers filed suit in this Court against Purdum, Armenta, and Maher.
 28 Olivers' claims are based upon its allegations that following the termination of the parties' business
 relationship, Purdum, Armenta and Maher interfered with Olivers' contracts and business operations.
Olivers Apparel, LLC v. Purdum et al., N.D. Cal. Civ. Case No. C-13-5284 DMR.

1 of course, at least until the defendant files a responsive pleading. After that point, leave to amend
2 should be granted unless amendment would cause prejudice to the opposing party, is sought in bad
3 faith, is futile, or creates undue delay. Fed. R. Civ. P. 15(a). Rule 15(a) provides that the court
4 should “freely give leave when justice so requires.” Fed. R. Civ. P. 15(a). “This policy is to be
5 applied with extreme liberality.” *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th
6 Cir. 2003) (quotation omitted). In the absence of an “apparent reason,” such as undue delay, bad
7 faith, dilatory motive, prejudice to defendants, futility of the amendments, or repeated failure to cure
8 deficiencies in the complaint by prior amendment, it is an abuse of discretion for a district court to
9 refuse to grant leave to amend a complaint. *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Lockheed*
10 *Martin Corp. v. Network Solutions, Inc.*, 194 F.3d 980, 986 (9th Cir. 1999). These factors do not
11 “merit equal weight,” and “it is the consideration of prejudice to the opposing party that carries the
12 greatest weight.” *Eminence Capital*, 316 F.3d at 1052. “Granting leave to amend does not
13 necessarily mean that the underlying allegations ultimately have merit.” *FlatWorld Interactives LLC*
14 *v. Apple Inc.*, 12-CV-01956-WHO, 2013 WL 6406437, at *3 (N.D. Cal. Dec. 6, 2013). “Rather,
15 ‘[a]bsent prejudice, or a strong showing of any of the remaining [] factors, there exists a
16 presumption under Rule 15(a) in favor of granting leave to amend.’” *Id.* (quoting *Eminence Capital*,
17 316 F.3d at 1052).

18 III. Discussion

19 Defendant opposes some, but not all of Plaintiffs’ motion. Defendant opposes the motion to
20 the extent it seeks to add E&R as a defendant and to bring conversion claims against Defendant and
21 E&R. The court will address each new proposed claim in turn.

22 A. Breach of Partnership Agreement

23 Plaintiffs seek to add a claim for breach of partnership agreement, which Defendant does not
24 oppose. At the hearing, Plaintiffs’ counsel clarified that this claim is not duplicative of the existing
25 breach of contract claim, as it provides an alternative theory of recovery if the trier of fact finds that
26 there was no valid contract between the parties. Accordingly, the court grants Plaintiffs leave to
27 amend the FAC to allege this claim.

28 B. Unjust Enrichment

1 Plaintiffs next seek to add a claim for unjust enrichment. Defendant does not oppose this
2 claim. However, unjust enrichment is not an independent cause of action under California law; it is
3 a restitution claim. *See Low v. LinkedIn Corp.*, 900 F. Supp. 2d 1010, 1031 (N.D. Cal. 2012)
4 (finding that California law does not recognize unjust enrichment as an independent claim;
5 collecting cases); *Maples v. SolarWinds, Inc.*, No C 12-6066 SBA, --F. Supp. 2d--, 2014 WL
6 2860848, at *8 (N.D. Cal. June 20, 2014) (stating that unjust enrichment is a quasi-contract claim
7 that “does not describe a theory of recovery, but an effect; the result of a failure to make restitution
8 under circumstances where it is equitable to do so”). Plaintiffs may seek compensation under an
9 unjust enrichment theory based upon their existing claim for breach of contract. *See Maples*, 2014
10 WL 2860848, at *8 (citing *Hernandez v. Lopez*, 180 Cal. App. 4th 932, 939 (2009)). Therefore, as
11 denial of leave to amend to add this claim will not preclude Plaintiffs’ recovery on this theory, leave
12 to amend the FAC to add an unjust enrichment claim is denied.

13 **C. Conversion Claim Against Defendant Wolfe**

14 Plaintiffs seek leave to amend the FAC to add a conversion claim against Defendant Wolfe.
15 Plaintiffs’ conversion claim against Wolfe is based upon his alleged wrongful taking of Olivers’
16 funds to pay for legal services provided by E&R in order “to pursue Wolfe’s own personal interest
17 and agenda through litigation.” (Proposed SAC ¶ 127.) Wolfe opposes this claim, arguing that it is
18 futile and unduly prejudicial. In addition, Wolfe asserts that the proposed amendment violates the
19 court’s March 26, 2014 order regarding amendment of the pleadings. The court will address each
20 argument in turn.

21 **1. Futility**

22 To determine whether an amended claim is futile, the proper test is identical to the one used
23 when considering the sufficiency of a pleading challenged under Federal Rule of Civil Procedure
24 12(b)(6). *Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988) (citing 3 J. Moore,
25 *Moore’s Federal Practice* ¶ 15.08[4] (2d ed. 1974)). A motion to dismiss under Rule 12(b)(6) tests
26 the legal sufficiency of the claims alleged in the complaint. *See Parks Sch. of Bus., Inc. v.*
27 *Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995). When reviewing a motion to dismiss for failure to
28 state a claim, the court must “accept as true all of the factual allegations contained in the complaint,”

1 *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam) (citation omitted), and may dismiss the case
2 where there is an absence of “sufficient factual matter to state a facially plausible claim to relief.”
3 *Shroyer v. New Cingular Wireless Servs., Inc.*, 622 F.3d 1035, 1041 (9th Cir. 2010) (citing *Ashcroft*
4 *v. Iqbal*, 556 U.S. 662, 677-78 (2009); *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001))
5 (quotation marks omitted). A claim has facial plausibility when a plaintiff “pleads factual content
6 that allows the court to draw the reasonable inference that the defendant is liable for the misconduct
7 alleged.” *Iqbal*, 556 U.S. at 678 (citation omitted).

8 Conversion is “any act of dominion wrongfully asserted over another’s personal property in
9 denial of or inconsistent with his rights therein.” *In re Bailey*, 197 F.3d 997, 1000 (9th Cir. 1999)
10 (citing *Igauye v. Howard*, 114 Cal. App. 2d 122, 126 (1952) (quotation marks omitted)). The
11 “elements of a conversion are the plaintiff’s ownership or right to possession of the property at the
12 time of the conversion; the defendant’s conversion by a wrongful act or disposition of property
13 rights; and damages.” *Oakdale Village Group v. Fong*, 43 Cal. App. 4th 539, 544 (1996). Wolfe
14 argues that Plaintiffs have failed to properly plead the first and third elements.

15 Plaintiffs allege that “[a]ll gains, profits, income, and revenue generated as a result of
16 Olivers’ business is the property of Olivers.” (Proposed SAC ¶ 125.) Based upon the Agreement,
17 Plaintiffs are majority-owning members of Olivers and are collectively entitled to 60% of Olivers’
18 property. (Proposed SAC ¶ 126.) Therefore, Plaintiffs claim that they have a right to possession of
19 at least some of Olivers’ monetary assets, thereby satisfying the first element of the claim.

20 In response, Defendant argues that Plaintiffs’ claim fails because they cannot show that they
21 have an exclusive interest in Olivers’ funds; at best, according to Defendant, Plaintiffs only have an
22 ownership interest in a portion of Olivers. Accordingly, Defendant argues that Plaintiffs’ failure to
23 plead an exclusive property interest in Olivers’ funds bars their conversion claim, citing *Kremen v.*
24 *Cohen*, 337 F.3d 1024, 1030 (9th Cir. 2002). In *Kremen*, the Ninth Circuit set forth a three-part test
25 to determine whether a property right exists for purposes of a conversion claim: “first, there must be
26 an interest capable of precise definition; second, it must be capable of exclusive possession or
27 control; and third, the putative owner must have established a legitimate claim to exclusivity.” *Id.*
28 (citation and quotation marks omitted). However, Defendant’s argument that *Kremen* imposes an

1 exclusivity requirement here is inapposite because the *Kremen* factors are used to determine whether
2 a party may claim an ownership interest in intangible goods, not the tangible property at issue in this
3 case. *See id.* at 1029-30 (considering property right in domain names); *Low*, 900 F. Supp. 2d at
4 1030 (considering property right in browsing history and “other personally identifiable
5 information”); *see also HP Debt Exch. LLC v. Wells Fargo Bank N.A.*, No. C-13-04717 EDL, 2014
6 WL 574600 at *8 (N.D. Cal. Feb. 12, 2014) (finding three-part *Kremen* test used to determine an
7 ownership right of intangible property did not apply to mortgage loan documents because they were
8 tangible property). As in *Oakdale*, where the court found that a business partner could be liable for
9 converting funds from a business partnership even though none of the partners exclusively owned
10 the interest in the partnership’s property, Plaintiffs sufficiently allege that Wolfe converted funds
11 that belonged to Olivers. *See Oakdale*, 43 Cal. App. 4th at 545.

12 Wolfe also argues that Plaintiffs have failed to properly allege damages in the form of a
13 “specific, identifiable sum” which is required when money is the subject of conversion. *See McKell*
14 *v. Washington Mutual, Inc.*, 142 Cal. App. 4th 1457, 1491 (2006). Plaintiffs respond that they have
15 stated the definite sum of \$270,000 in Kickstarter funds that Wolfe unilaterally converted, an
16 amount that included their shares. Furthermore, Plaintiffs assert that they cannot state a more
17 specific amount because Wolfe controls Olivers’ financial records to which Plaintiffs do not have
18 access. Because Plaintiffs allege an identifiable amount and will be able to name a more precise
19 amount through discovery, they have sufficiently pleaded the element of damages. *See, e.g.*,
20 *Trustees of the S. Cal. Pipe Trades Health & Welfare Trust Fund v. Temecula Mech., Inc.*, 438 F.
21 Supp. 2d 1156, 1172 (C.D. Cal. 2006) (allowing leave to amend despite lack of specificity of money
22 damages because plaintiffs lacked access to the necessary data in defendants’ possession); *Natomas*
23 *Gardens Inv. Grp, LLC v. Sinandinos*, 710 F. Supp. 2d 1008, 1019 (E.D. Cal. 2010) (finding “that at
24 the pleading stage it is only necessary for plaintiffs to allege an amount of money that is capable of
25 identification” (quotation marks omitted)).

26 Plaintiffs have sufficiently alleged facts to satisfy the elements of a conversion claim against
27 Wolfe.

28 **2. Undue Prejudice**

1 Next, Wolfe argues that the addition of the conversion claim will result in undue prejudice.
2 Wolfe asserts that Plaintiffs seek to add this claim after eight months of litigation, but present no
3 newly-discovered facts to support it. He also states that the new claim will force him to issue
4 supplemental discovery requests and devise a strategic response to the new legal theory. According
5 to Wolfe, this additional preparation for litigation amounts to undue prejudice.

6 In some circumstances, the need to conduct further discovery or the addition of new legal
7 theories can amount to undue prejudice. *See, e.g., Irise v. Axure Software Solutions, Inc.*, No. CV
8 08-03601 SJO (JWJx), 2009 WL 3615973, at *4 (C.D. Cal. July 30, 2009) (finding plaintiff would
9 be unduly prejudiced by having to prepare new lines of argument two months before trial). Here,
10 the court does not find that Wolfe would be unduly prejudiced by the addition of a conversion claim.
11 Discovery will continue for two months, and trial is nearly six months away. It is unlikely that
12 Wolfe will have to conduct significant additional discovery relevant to this claim as he already
13 possesses the necessary evidence, such as Olivers' financial records. Moreover, addition of the
14 conversion claim will not result in a significant shift of case theory and preparation; the same
15 transactions and events underlying the original claims are also central to the conversion claim.

16 **3. Court Order**

17 Defendant also argues that Plaintiffs' conversion claim does not comply with the court's
18 March 26, 2014 order regarding the amendment of pleadings. Defendant argues that the order does
19 not allow Plaintiffs to introduce new claims that are not related to the original causes of action.
20 However, the order directed the parties to bring claims or remedies that would lead to a
21 determination of the parties' ownership interests in Olivers in their amended pleadings. (March 26,
22 2014 Order 1-2.) It did not place restrictions on the type of claims that could be added.

23 In sum, because Plaintiffs' conversion claim against Wolfe is not futile, and would not
24 unduly prejudice Wolfe or violate the court's order, the court grants Plaintiffs leave to amend to add
25 this claim.

26 **D. Conversion Claim Against E&R**

27 Plaintiffs next move to add E&R as a defendant and to bring a conversion claim against the
28 firm. Plaintiffs' proposed conversion claim against E&R is based upon their allegations that Wolfe

1 wrongfully used Olivers' funds to pay E&R to pursue Wolfe's personal agenda in this litigation, and
2 that E&R knowingly accepted funds that did not belong to Wolfe. (Proposed SAC ¶¶ 127, 128.)

3 Wolfe argues that the court should not grant leave to add E&R because it will result in undue
4 prejudice. Specifically, Wolfe argues that the addition of his counsel as a defendant will create a
5 conflict of interest between them, forcing E&R to "strike an impossible balance between defending
6 the Conversion claim brought against it and continuing to represent Defendant in this litigation."
7 (Def.'s Opp'n 4.) In response, Plaintiffs assert that adding E&R as a defendant will not prejudice
8 Wolfe because E&R is not Wolfe's "primary counsel." Plaintiffs argue that a lawyer from another
9 firm is designated as lead trial counsel in this matter, and has filed the pleadings and motions for
10 Wolfe.

11 Plaintiffs' argument is unpersuasive. Undue prejudice will arise from the potential for a
12 conflict of interest between Wolfe and his lawyers. If E&R is added as a defendant, it would likely
13 have to withdraw from representing Wolfe. This is because E&R's duty of loyalty to its client,
14 Wolfe, would likely be compromised if it had to defend its interests while simultaneously
15 representing Wolfe. Further, it is difficult to see how E&R could offer evidence or testify on its
16 behalf without violating its duty to maintain attorney-client privilege as to its communications with
17 Wolfe. *See Cal. R. Prof. Conduct 3-100(A).* It is of little import that Wolfe has other counsel of
18 record, as Plaintiffs have presented no evidence about the respective roles of defense counsel in this
19 litigation. Given the prejudice that would result from adding E&R as a defendant at this point in the
20 litigation, the court denies leave to amend the FAC to add a conversion claim against E&R.³ *See*
21 *Eminence Capital*, 316 F.3d at 1052 (finding "consideration of prejudice to the opposing party . . .
22 carries the greatest weight.").

23 **E. Declaratory Relief**

24 Finally, Plaintiffs seek leave to add a claim for declaratory relief, stating that they are
25 entitled to a declaratory judgment determining that their partnership interests are either 60% as a
26 whole or 25% each. (Proposed SAC ¶ 133.) Defendant does not oppose the addition of this claim.

27
28 ³ Wolfe also appears to argue that a conversion claim against E&R would be futile because
Plaintiffs cannot allege an exclusive interest in Olivers' funds and have not stated a specific sum. This
argument is without merit for the same reasons discussed above.

1 Declaratory relief is appropriate “(1) when the judgment will serve a useful purpose in clarifying and
2 settling the legal relations in issue, and (2) when it will terminate and afford relief from” the conflict
3 underlying the lawsuit. *Tech. & Intellectual Prop. Strategies Grp. PC v. Fthenakis*, No. C 11-2373
4 MEJ, 2011 WL 3501690, at *10 (N.D. Cal. Aug. 10, 2011) (quoting *Guerra v. Sutton*, 783 F.2d
5 1371, 1376 (9th Cir. 1986)). Here, if the trier of fact concludes that there was no valid contract
6 between the parties, declaratory relief will “serve a useful purpose” in clarifying the parties’
7 ownership interests in Olivers. Accordingly, the court grants Plaintiffs leave to amend the FAC to
8 add a claim for declaratory relief.

9 **III. Conclusion**

10 For the foregoing reasons, Plaintiffs’ motion for leave to amend the FAC is granted in part
11 and denied in part. Plaintiffs are granted leave to file a second amended complaint consistent with
12 this order within seven (7) days of this order.

13
14 Dated: August 6, 2014
15
16
17
18
19
20
21
22
23
24
25
26
27
28

